OCA 87-5695

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

11/12/87

For [redacted] STAT

Attached is the Justice Department views letter on the proposed Security Clearance amendment to FERS, Whistleblower Protection Act.

Wilda Scheuren

Office of Legislative and Intergovernmental Affairs

OCA 87-5695

Office of the Assistant Attorney General

Washington, D.C. 20530

November 6, 1987

Honorable James C. Miller, III
Director
Office of Management and Budget
Washington, D.C. 20500

Dear Mr. Miller:

This is to provide you with the views of the Department of Justice on a House Post Office and Civil Service Committee proposed amendment to H.R. 25, the Whistleblower Protection Act of 1987, which has been reported to the House of Representatives by the Committee on Post Office and Civil Service. For the following reasons, the Department is very strongly opposed to the proposed amendment.

The proposal would amend section 2302 of title 5, United States Code, by adding a new subsection (e) to that section. Its purpose appears to be to allow an individual subject to a personnel action (for example, a removal or a demotion) as a result of the denial of a security clearance or denial of access to classified information or to a secured installation to challenge the underlying action (for example, the denial of a clearance) before the Merit Systems Protection Board upon the ground that the underlying action was based upon a prohibited personnel practice.

In Egan v. Department of the Navy, 28 MSPR 509 (1985), the MSPB held that it could not review a decision by the Department of the Navy to deny Mr. Egan a security clearance in connection with his appeal to the board of his removal from his civilian position with the Navy. His removal was based solely upon the Navy's determination that Mr. Egan was not eligible for a clearance, and the holding of a clearance was a condition of his employment. In a two-to-one decision, the United States Court of Appeals for the Federal Circuit reversed. Egan v. Department of the Navy, 802 F.2d 1563 (Fed. Cir. 1986). The court of appeals held that the MSPB was required to review the Navy's clearance determination in conjunction with Mr. Egan's appeal of his removal.

We sought review of the court of appeals's decision by the Supreme Court, which granted our petition for a writ of certiorari. Department of the Navy v. Egan, 107 S. Ct. 2459 (U.S. May 26, 1987). In our briefs to the Supreme Court, we argued that, when Congress enacted the Civil Service Reform Act of 1978, it gave no indication that the MSPB was to become involved in the security clearance process -- a process that, prior to the Reform Act's enactment, had not been subject to scrutiny by other than the head of each agency. We also argued that the making of security clearance determinations is a quintessentially Executive function, one that flows from the President's power to provide for the national defense. U.S. Const. Art. II, § 2. That power has been delegated by the President to the heads of the Executive Branch agencies. Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 Comp.).

It would be highly inappropriate for the MSPB to be granted authority to second-guess the officers of the Executive Branch charged by the President with the responsibility of making national security determinations. In Cole v. Young, 351 U.S. 536, 546 (1956), the Supreme Court held that the "agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." This is so because "wide latitude in designating persons qualified for access to classified . . . information" is a "necessary adjunct to the power and duty to defend the security of the Nation." Greene v. McElroy, 254 F.2d 944, 949 (D.C. Cir.), rev'd on other grounds, 360 U.S. 474 (1959).

Moreover, a clearance may be granted only when it is determined that an individual has a need for access to classified information, Exec. Order No. 12,356, 3 C.F.R. 174 (1983), and that his access is "clearly consistent with the interests of national security." Exec. Order No. 10,450, §§ 2, 7. A determination whether an individual needs access to classified information relates solely to the requirements of the position, not the character of the individual. A clearance determination is not an attempt to judge an individual but an attempt to predict his future behavior, to assess whether he is likely, through disloyalty or venality or carelessness or under the compulsion of circumstances beyond his control, to compromise sensitive information. The prediction may be based upon the individual's own past or present conduct, or it may be based upon concerns unrelated to an individual's conduct (for example, where an individual has close relatives residing in a country that is hostile to the United States). These necessarily subjective judgments must be made by those with expertise in making the necessary predictions and -- especially because under the "clearly consistent" standard the clearance may not be granted unless an affirmative prediction can be made with confidence --

it is not reasonably possible for an outside, inexpert body to review the substance of such a judgment.

The reasons set forth above, and those that led the Congress that enacted the Civil Service Reform Act of 1978 to exclude the intelligence agencies of the Executive Branch from the operation of 5 U.S.C. § 2302, the section of law establishing the prohibited personnel practices, all counsel against allowing the MSPB to become involved in the merits of clearance and access determinations. Our Nation's security must be protected, and the Constitution provides that the responsibility for doing so lies with the President and those to whom he has assigned that task. The MSPB does not fit within that scheme, and the security interests of the United States will not be well-served by forcing the MSPB to become involved in an area in which it simply does not belong.

Sincerely,

John R. Bolton
Assistant Attorney General